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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

COOKSEY BROTHERS DISPOSAL COMPANY, INC.,

Petitioner,

vs.

BOYD COUNTY, KENTUCKY,

Respondent.

On Petition For Writ Of Certiorari To The Kentucky Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTIONS PRESENTED

The questions presented by this petitioner are:

(a) Whether the imposition by Kentucky of a public service corporation franchise tax on private municipal solid waste landfills violates the Equal Protection provision of the Fourteenth Amendment?

(b) Whether the action of the Kentucky Court of Appeals in *sua sponte* creating a rational basis for the state's arbitrary tax classification constitutes a violation of the Due Process provision of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Petitioner, Cooksey Brothers Disposal Company, Inc., is a closely-held, Kentucky corporation, owned and operated by the same family since 1972. The principal business of the company is the operation of a municipal solid waste landfill near Ashland in Boyd County, Kentucky.

Respondent, Boyd County, Kentucky, is the local subordinate political division of the Commonwealth of Kentucky.

RULE 29.6 STATEMENT

The Petitioner, Cooksey Brothers Disposal Company, Inc., is a closely-held, Kentucky corporation. It is not associated with a parent corporation, nor does it have an affiliation with any subsidiary corporation.

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Petitioner's appendix contains the relevant documents from the proceedings below:

1. Trial Court's Findings of Fact, Conclusions of Law and Judgment granting Summary Judgment to Respondent: app. at 13.

2. Opinion of the Kentucky Court of Appeals (12/12/97): app. at 1.

3. Order of the Kentucky Supreme Court denying discretionary review: app. at 18.

JURISDICTIONAL STATEMENT

The entry date of the Order of the Kentucky Supreme Court denying discretionary review of the opinion of the Kentucky Court of Appeals is May 13, 1998. The Kentucky Court of Appeals entered its opinion on December 12, 1997. The appellate decision resulted from an appeal of a Kentucky Circuit Court decision.

Jurisdiction is conferred upon this Court to review, by writ of certiorari, the appellate decision in question by 28 U.S.C. § 1257(c).

This Court should grant the writ of certiorari under the authority of Rule 10(c) of this Honorable Court.

The Kentucky appellate court decision is final on the issue of the Equal Protection provision of the Fourteenth Amendment raised by the petitioner before the trial court

and not subject to further review in the state courts of Kentucky.

CONSTITUTIONAL PROVISIONS

U. S. CONST. amend. XIV, § 1, provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

KY CONST. § 1 provides that "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

First: The right of enjoying and defending their lives and liberties.

Second: The right of worshipping Almighty God according to the dictates of their consciences.

Third: The right of seeking and pursuing their safety and happiness.

Fourth: The right of freely communicating their thoughts and opinions.

Fifth: The right of acquiring and protecting property.

Sixth: The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress

of grievances or other proper purposes, by petition, address or remonstrance.

Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons."

KY CONST. § 2 provides that "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

KY CONST. § 3 provides that "All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment."

KY CONST. § 171 provides that "The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

The General Assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation.

Bonds of the state and of counties, municipalities, taxing and school districts shall not be subject to taxation.

Any law passed or enacted by the General Assembly pursuant to the provisions of or under this amendment, or amended section of the Constitution, classifying property and providing a lower rate of taxation on personal property, tangible or intangible, than upon real estate shall be subject to the referendum power of the people, which is hereby declared to exist to apply only to this section, or amended section. The referendum may be demanded by the people against one or more items, sections, or parts of any act enacted pursuant to or under the power granted by this amendment, or amended section. The referendum petition shall be filed with the Secretary of State not more than four months after the final adjournment of the Legislative Assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people under this section. All elections on measures referred to the people under this act shall be at the regular general election, except when the Legislative Assembly shall order a special election. Any measure referred to the people shall take effect and become a law when approved by the majority of the votes cast thereon, and not otherwise. The whole number of votes cast for the candidates for Governor at the regular election, last preceding the filing of any petition, shall be the basis upon which the legal voters necessary to sign such petition shall be counted. The power of the referendum shall be ordered by the Legislative Assembly at any time any acts or bills are enacted, pursuant to the power granted under this section or amended section, prior to

the year of one thousand nine hundred and seventeen. After that time the power of the referendum may be ordered either by the petition signed by the five percent of the legal voters or by the Legislative Assembly at the time said acts or bills are enacted. The General Assembly enacting the bill shall provide a way by which the act shall be submitted to the people. The filing of a referendum petition against one or more items, sections or parts of an act, shall not delay the remainder of that act from becoming operative."

KY. REV. STAT. ANN. 224.01-010(15) provides that " 'Municipal solid waste disposal facility' means any type of waste site or facility where the final deposition of any amount of municipal solid waste occurs, whether or not mixed with or including other waste allowed under Subtitle D of the Federal Resource Conservation and Recovery Act of 1976, as amended, and includes, but is not limited to, incinerators and waste-to-energy facilities that burn municipal solid waste, and contained and residential landfills, but does not include a waste site or facility which is operated exclusively by a solid waste generator on property owned by the solid waste generator which accepts only industrial solid waste from the solid waste generator or industrial solid waste generated at another facility owned and operated by the generator or wholly-owned subsidiary, or a medical waste incinerator which is owned, operated, and located on the property of a hospital or university which is regulated by the cabinet and used for the purpose of treatment, prior to landfill, of medical waste received from the generator exclusively or

in combination with medical waste generated by professionals or facilities licensed or regulated or operated by the Commonwealth;".

KY. REV. STAT. ANN. 224.43-010 provides that "(1) It is hereby declared to be the policy of this Commonwealth and the purpose of this chapter to provide for the management of solid waste, including reduction, collection, transportation, and disposal in a manner that will protect the public health and welfare, prevent the spread of disease and creation of nuisances, conserve our natural resources, and enhance the beauty and quality of our environment.

(2) It is the policy of the Commonwealth to limit and reduce the amount of solid waste disposed in municipal solid waste disposal facilities in the Commonwealth and to encourage a regional approach to solid waste management.

(3) It is the policy of the Commonwealth that a comprehensive and integrated waste management system to handle solid waste is to be fostered. State policies and funding assistance shall reflect a preference for solid waste management practices according to the following priority:

(a) Reduction in the amount of waste generated;

(b) Reuse of solid waste;

(c) Waste recycling or yard waste composting;

(d) Resource recovery through mixed municipal solid waste composting or incineration;

(e) Land disposal in publicly-owned landfills or incineration of solid waste without energy recovery; and

(f) Land disposal in landfills other than publicly-owned landfills.

(4) It is further the goal of this Commonwealth that the amount by weight of municipal solid waste disposed at municipal solid waste disposal facilities shall be reduced by a minimum of twenty-five percent (25%) by July 1, 1997, as compared to fiscal year 1993 on a statewide per capita basis. However, credit shall be given for reductions achieved prior to 1993 when accurate measurements are available. The reduction goal shall not apply to special wastes as designated by KRS 224.50-760 or industrial solid waste."

KY. REV. STAT. ANN. 136.120(1) provides that "Every railway company, sleeping car company, chair car company, dining car company, gas company, water company, ferry company, bridge company, street railway company, interurban electric railroad company, express company, electric light company, electric power company, telephone company, telegraph company, commercial air carrier, air freight carrier, pipeline company, common carrier water transportation company, privately owned regulated sewer company, cable television company, *municipal solid waste disposal facility, as defined by KRS 224.01-010(15), where solid waste is disposed by landfilling*, railroad car line company, which means any company, other than a railroad company, which owns, uses, furnishes, leases, rents, or operates to, from, through, in, or across this state or any part thereof, any kind of railroad car including, but

not limited to, flat, tank, refrigerator, passenger, or similar type car, and every other like company or business performing any public service, except bus line companies, regular and irregular route common carrier trucking companies, and taxicab companies, shall annually pay a tax on its operating property to the state and to the extent the property is liable to taxation shall pay a local tax thereon to the county, incorporated city, and taxing district in which its operating property is located." (emphasis added)

STATEMENT OF THE CASE

Petitioner, Cooksey Brothers Disposal Company, Inc. ("Cooksey"), contests its classification for corporate tax purposes within that group of companies liable for the Kentucky public service corporation property tax provided for by KRS 136.120(1).

Boyd County, Kentucky ("Boyd County") brought suit against Cooksey in Boyd Circuit Court attempting to recover "unpaid franchise taxes" alleged to be owing under KRS 136.120(1). At the behest of the Revenue Cabinet of the Commonwealth of Kentucky, Boyd County sought to impose this franchise tax on Cooksey because it operates a contained landfill (hereinafter "MSWLF") within the county; KRS 136.120(1) having been amended in 1991, by legislative fiat (see 1991 Ky. Acts 1st Extraordinary Sess., SB2 at Section 50, lodged herewith), in order to draw into its scheme MSWLFs, even though many of these companies were entirely private and enjoyed no

special privileges or advantages typically enjoyed by true public utilities and public service companies.

Cooksey answered, denying that it was indebted to Boyd County for unpaid franchise taxes and affirmatively setting forth a Counterclaim challenging the validity and constitutionality of KRS 136.120(1). Cooksey's constitutional challenges to the statute included the fact that the Legislature (a) attempted to expand the scope of the statute beyond its stated purpose of imposing a tax on public service corporations (in violation of Section 51 of the Kentucky Constitution) and (b) imposed a tax on private MSWLFs without invoking a tax on other similarly-situated corporations and classified Cooksey with public utilities, or public service companies, when in fact Cooksey is not (in violation of Sections 1, 2, 3, and 171 of the Kentucky Constitution and the Fourteenth Amendment of the United States Constitution).

Boyd County sought a determination of the matters presented in the Complaint and Counterclaim through summary judgment. In opposition to the Motion for Summary Judgment, Cooksey presented uncontradicted evidence, by affidavit, that it is not regulated by the Kentucky Public Service Commission, nor is it compelled by any law, regulation, statute, or agreement to serve any particular customer or any particular class of customers; that it does not enjoy the benefit and privileges of an exclusive franchise or monopoly. Cooksey further proved that the contracts into which it enters are private contracts which are not subject to any regulation by the state. Cooksey obtained a judicial admission from Boyd County that private MSWLFs such as Cooksey are not public service corporations.

The Boyd Circuit Court granted summary judgment to Boyd County upholding the constitutionality of KRS 136.120(1). The Court found that Cooksey was subject to the public service company tax. It acknowledged that Cooksey was not a public service corporation, but found that fact to be of no consequence, app. at 14:

> The court finds no legal significance to Cooksey's argument that it is not a public service corporation or a public utility. *The plaintiff has conceded that Cooksey is not a public service corporation nor a public utility,* but those are not the only business entities subject to the provisions of KRS 136.120. (emphasis added)

Remarkably, the trial court held that "[t]he General Assembly has set forth a rational basis for including businesses that engage in solid waste disposal by the landfill method in KRS 136.120." Importantly, although the trial court stated that the General Assembly set forth a "rational basis" for including Cooksey within the scheme of KRS 136.120(1), none was enumerated by the Respondent to the trial court; thus, it is not surprising that the "rational basis" was not set forth by the trial court in its Order and Judgment: app. at 15. Thus, the Respondent not having pled the "rational basis" for the classification and the trial court not having articulated the "rational basis" in its Judgment, Cooksey was left to tilt at windmills on appeal.

The Court of Appeals recognized this substantial deficiency in the trial court record, app. at 7:

> The circuit court expressed no particular justification for the classification. It concluded that there was no legal significance to the fact that

Cooksey is not a public service corporation, like the other entities taxed under KRS 136.120.

ARGUMENTS AND REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

WHETHER THE IMPOSITION BY KENTUCKY OF A PUBLIC SERVICE CORPORATION FRANCHISE TAX ON PRIVATE MUNICIPAL SOLID WASTE LANDFILLS VIOLATES THE EQUAL PROTECTION PROVISION OF THE FOURTEENTH AMENDMENT.

Sections 1, 2, 3 and 171 of the Kentucky Constitution and the Fourteenth Amendment to the United States Constitution preclude the classification which resulted from the 1991 amendment to KRS 136.120(1), by which MSWLFs were included in the same classification for tax purposes as public service corporations (see 1991 Ky. Acts 1st Extraordinary Sess., SB2, at Section 50, lodged herewith). There is no rational basis for classifying private MSWLFs differently from other types of solid waste disposal facilities. The statute as amended thus violates the Equal Protection and Uniformity provisions of the federal and state constitutions.

The Kentucky General Assembly has long recognized two categories of corporations: nonpublic service corporations which are taxed under KRS 136.070, and public service corporations which are taxed under KRS 136.120(1). These categories are based upon the distinctions between the two kinds of corporations.

> One kind is that which has or exercises some special or exclusive privilege or franchise not

> allowed by law to natural persons, or performing some public service, many of which are named, but all classified as corporations which must pay a franchise tax "in addition to other taxes imposed by law" (Sec. 4077, Ky. St.), the other is the commercial corporation which enjoys no privilege not exercised by natural persons, and which does not pay a franchise tax.

Commonwealth v. Walsh's Trustee, 133 Ky. 103, 112, 117 S.W. 398 (1909). The purpose of KRS 136.120 in its original form was "to reach persons or corporations having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service." *Louisville Tobacco Warehouse Co. v. Commonwealth*, 106 Ky. 165, 178, 49 S.W. 1069 (1899) (concurring opinion). Corporations not possessing or exercising an exclusive privilege did not pay a franchise tax. *Marion National Bank of Lebanon v. Burton*, 121 Ky. 876, 888-889, 90 S.W. 944 (1906).

The 1991 amendment to KRS 136.120(1) drastically changed this scheme by arbitrarily adding private MSWLFs to the public service corporation classification. Yet, as Respondent Boyd County judicially admitted before the trial court, Cooksey is not a public service corporation. Private MSWLFs are not regulated by the Kentucky Public Service Commission. They are not compelled by law, regulation, statute, or agreement to serve any customer. They operate through private contracts. They benefit from no exclusive franchise, privilege, immunity, or advantage. These nonpublic service corporations are not within the same category as railways, gas,

water, and electric companies, i.e., public service corporations. See *Louisville Tobacco Warehouse Co. v. Commonwealth*, 106 Ky. at 179 ("Section 4077 was not intended to apply to any of these, but only to such corporations or companies as exercised special and exclusive franchises, or performed some public service."). Nonetheless, the General Assembly arbitrarily removed private MSWLFs from the KRS 136.070 classification and placed them in the public service corporation classification.

There are endless examples of nonpublic service corporations similarly situated as private MSWLFs, which are not taxed under KRS 136.120(1), but instead remain in the category of corporations taxed under KRS 136.070. Corporations providing garbage or refuse pick-ups, refuse recycling facilities, on-site MSWLFs, refuse incinerator companies, medical services companies, and corporations providing professional services all provide a service to the public, but none are taxed as a public service corporation. Accordingly, they are classified properly as nonpublic service corporations while private MSWLFs are placed awkwardly in the same classification as public service corporations. There is no justification for this disparity. Importantly, although the definition of "municipal solid waste disposal facility" found at KRS 224.01-010(15) includes private incinerators and waste-to-energy facilities, as well as MSWLFs, only MSWLFs were included in the taxing scheme of KRS 136.120(1), thus sharply separating private MSWLFs, such as petitioner, for distinct tax treatment different from other municipal solid waste disposal facilities.

The difference upon which a classification is based "must be substantial and upon a natural and reasonable

basis." *City of Louisville v. Koehler*, 264 S.W.2d 80, 84 (Ky., 1954). There is nothing either natural or reasonable about segregating private MSWLFs from other nonpublic service corporations, especially other private waste disposal corporations, such as incinerators and waste-to-energy facilities.

Remarkably, the alleged "rational basis" upon which this classification is justified was first disclosed, in this proceeding, by the Kentucky Court of Appeals. Significantly, the Court of Appeals did not rely upon the environmental interest which the State has in solid waste disposal as the justification for this arbitrary distinction, app. at 8-9. This is not surprising, since, under the tax scheme as amended in 1991, private MSWLFs are segregated from other types of solid waste reduction facilities and other waste disposal facilities. If there was, in fact, a rational basis for the KRS 136.120(1) classification, it must be to protect the State's environmental interest in solid waste disposal; however, a rational basis impinging on environmental protection would have compelled a broader classification which included all solid waste disposal facilities such as solid waste haulers, recycling facilities, solid waste incinerators, and waste-to-energy facilities.

To be constitutional, the categories designated by the Legislature must "form by themselves a proper and legitimate class with reference to the purpose of the Act." *Kentucky Tax Commission v. Lincoln Bank & Trust Co.*, 245 S.W.2d 950, 951 (Ky., 1952). This entails consideration of two factors: (1) the purpose of the Act, and (2) whether the classification can reasonably be said to relate to that purpose. *Kentucky Tax Commission v. Lincoln Bank & Trust*

Co., 245 S.W.2d at 952. Although the Court of Appeals attempted to define the purpose of the 1991 amendment, it failed to address how the classification is related to such purpose.

Instead, the Court of Appeals simply created reasons (not previously disclosed in the record) why the Legislature has chosen to regulate the operations of private MSWLFs. It explained: "the General Assembly stated that '[i]t is the policy of the Commonwealth to limit and reduce the amount of solid waste disposed in municipal solid waste disposal facilities in the Commonwealth and to encourage a regional approach to solid waste management' ", app. at 8 (see KRS 224.43-010). Making a tremendous leap from the environmental statutes found in KRS Chapter 224 to the tax provisions of KRS 136.120(1), the Court of Appeals noted (app. at 8-9):

> In connection with its desire to control these matters, [the General Assembly] has elected to cause municipal solid waste disposal facilities to be taxed along with public service corporations pursuant to KRS 136.120. *By taxing such facilities in this manner, the Revenue Cabinet has the sole power to value and assess all of the property of each business. KRS 136.120(3). The effect of this is to centralize and bring uniformity to the assessment of these companies' property.* (emphasis added)

Thus, the Court of Appeals admits that the tax classification has nothing to do with environmental protection, the stated purpose of the 1991 Act which, *inter alia*, amended KRS 136.120(1) (see 1991 Ky. Acts 1st Extraordinary Sess., Sections 2 and 50, lodged herewith). Importantly, the Court of Appeals ignored the fact that, of all types of

municipal solid waste disposal facilities defined by KRS 224.01-010(15), only MSWLFs were brought into the tax scheme of KRS 136.120(1).

This explanation is a hollow one; it presents no justification for a tax scheme which does not relate in any fashion to the stated purpose of the Act (see 1991 Ky. Acts 1st Extraordinary Sess., Section 2, lodged herewith, now codified as KRS 224.43-010). The environmental policies set forth in KRS Chapter 224.43-010 are not furthered by moving only one type of solid waste disposal facility from the scope of KRS 136.070 and placing it in the public service corporation classification. The tax has no bearing on the amount of solid waste disposed in Kentucky or the manner in which it is disposed. Indeed, it is difficult to understand how any tax statute could further the environmental goals, stated in the Act, absent a specific earmarking of revenues, which is lacking from the provisions of KRS 136.120(1). *Cf., Commonwealth, Revenue Cabinet v. Smith,* 875 S.W.2d 873 (Ky., 1994), *cert. denied,* 115 S.Ct. 509. A "regional approach" to solid waste management is not furthered by taxing private MSWLFs differently from other solid waste disposal facilities. Nor is there any correlation between the tax scheme and the goal of reducing the amount of municipal solid waste in the Commonwealth. In fact, separating various types of solid waste disposal facilities into different classifications is inconsistent with the legislative intent of obtaining "a comprehensive and integrated waste management system to handle solid waste." See KRS 224.43-010(3).

It is well-settled that the burden is on the one attacking the legislative arrangement to negative every *conceivable* basis which might support it, *Madden v. Kentucky,* 309

U.S. 83, 88, 84 L.Ed. 590 (1940). However, it naturally follows from this rule that the articulated basis should at least be "conceivable". Clearly, the rational basis, first articulated in this case by the appellate court, could never have been "conceived" by Cooksey Brothers prior to the initiation of this action.

This becomes especially clear when a review of KRS 224.01-010(15) clearly discloses that the term "municipal solid waste facility" includes within its purview " . . . *any type of waste site or facility* where the final disposition of any amount of municipal solid waste occurs . . . ", including, specifically, incinerators, waste-to-energy facilities, and contained and residential landfills (MSWLFs). However, only MSWLFs were placed by the 1991 amendment into the taxing scheme of KRS 136.120(1). There is no rational basis to exclude other specifically enumerated disposal facilities, such as incinerators, from this tax scheme and, understandably, it would have been impossible for Cooksey Brothers to have "conceived" of a rational basis for such a distinction.

If there is some rational and conceivable nexus between the purpose of Senate Bill 2 (see 1991 Ky. Acts 1st Extraordinary Sess., SB2, Section 2, lodged herewith), now codified at KRS 224.43-010 and the basis announced *sua sponte* by the Kentucky Court of Appeals, that "rational basis" should at least apply to all private businesses described at KRS 224.01-010(15), and it plainly does not; only disposal facilities where solid waste is disposed by landfilling (MSWLFs) were placed into the tax scheme of KRS 136.120(1). Clearly a hostile and oppressive classification without any "rational basis".

Since the classification which resulted from the 1991 amendment to KRS 136.120(1) is not reasonably related to the alleged purpose of the statute, the classification cannot withstand a constitutional challenge. *Burge v. Marcum*, 394 S.W.2d 908, 909 (Ky., 1965). Cooksey urges the Court to grant Certiorari of this matter so that these issues surrounding the constitutionality of the 1991 amendment of KRS 136.120(1) can be properly resolved.

II.

WHETHER THE ACTION OF THE KENTUCKY COURT OF APPEALS IN *SUA SPONTE* CREATING A RATIONAL BASIS FOR THE STATE'S ARBITRARY TAX CLASSIFICATION CONSTITUTES A VIOLATION OF THE DUE PROCESS PROVISION OF THE FOURTEENTH AMENDMENT.

It is generally understood that a state's tax classification will withstand constitutional scrutiny provided a "rational basis" for the classification exists. *Welch v. Henry*, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 (Wis., 1938), *rehearing denied*, 59 S.Ct. 250, 305 U.S. 675, 83 L.Ed. 437. However, whether or not such a sufficient "rational basis" can be enumerated, it is a fundamental requirement of due process, when the taxing statute is questioned, that the "rational basis" for the classification must be disclosed. Otherwise, it is impossible for the taxpayer to determine whether there is *any* basis for the classification, much less a basis that is "rational".

Importantly, in this proceeding, the state's "rational basis" for the questioned classification was never disclosed during the trial court proceeding either in the Respondent's pleadings or during the summary judgment

hearing. The court, in its Order and Judgment, did not articulate the "rational basis", app. at 15; this omission was noticed by the Court of Appeals, app. at 7.

In fact, Cooksey remained, throughout both the trial court and appellate court proceedings, without any articulation of the reasons upon which the "rational basis" justifying the classification rested. Significantly, not until the Court of Appeals issued its Opinion was a purported "rational basis" first articulated. A more pristine example of the arbitrary state action prohibited by Kentucky Constitution § 2 cannot be found.

The fact that a "rational basis" was never disclosed until an appellate court issued its opinion is a clear indicia that the "rational basis" for the classification is capricious and arbitrary, and not founded on any reasonable distinction.

It is fundamental that due process requires that an opportunity to be heard be full and fair, not merely colorable or illusive, and the protection afforded extends into every type of legal proceeding: see *Tomayko v. Thomas*, 143 So.2d 227, 230 (Fla., 1962); *Blakeway v. Texas Business Investments Co.*, 470 P.2d 710, 712 (Ariz., 1970). Certainly, Cooksey has been denied an opportunity to be heard if it was never afforded an opportunity to rebut the undisclosed rationale for the tax classification until the Court of Appeals rendered its Opinion. The legal concept of "rational basis" is not a chimera to be speculated on at the taxpayer's risk; it begs the obvious to state that, before it can be refuted, it must be disclosed.

It is well known that due process requires that there be an opportunity to present every available defense.

American Surety Co. v. Baldwin, 287 U.S. 156, 168, 77 L.Ed. 231, 239, 53 S.Ct. 98, 86 ALR 298 (Idaho, 1932). Quite simply, Cooksey was never afforded an opportunity to defend or rebut the proffered "rational basis" which was never articulated in this proceeding until the issuance of the Opinion of the Kentucky Court of Appeals.

When it is considered that the "rational basis" for the tax classification is the gravamen of this case, a more insidious denial of due process cannot be imagined.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests this Honorable Court to grant the Petition for Writ of Certiorari in this case in order to ensure that the guarantees provided by the Fourteenth Amendment protect the petitioner from the effect of a hostile and oppressive tax classification applied without any rational basis.

DATED: August 7, 1998

Respectfully submitted,

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RENDERED: December 12, 1997; 2:00 p.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

97-CA-0400-MR

COOKSEY BROTHERS DISPOSAL COMPANY, INC. — APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
CIVIL ACTION NO. 96-CI-0227

BOYD COUNTY, KENTUCKY — APPELLEE

OPINION

AFFIRMING

* * *

BEFORE: BUCKINGHAM, GUIDUGLI, and JOHNSON, Judges.

BUCKINGHAM, JUDGE. Cooksey Brothers Disposal Company, Inc., (Cooksey) appeals from a summary judgment in favor of Boyd County, Kentucky (Boyd County), in an action to collect unpaid public service corporation taxes. For the reasons set forth hereinafter, we affirm.

Boyd County filed suit against Cooksey alleging that Cooksey failed to pay local franchise taxes under Kentucky Revised Statute (KRS) 136.120. Cooksey answered and counterclaimed, admitting that it had not paid the taxes but asserting that, as a private business entity, it could not be constitutionally taxed under the statute as a public service corporation. It sought to have the court

declare KRS 136.120(1) unconstitutional as to municipal solid waste disposal facilities that dispose of solid waste by landfill and also challenged the assessment as double taxation in conjunction with the tax authorized by KRS 68.178. Holding the statute in question to be constitutional as it applies to these solid waste disposal facilities, the Boyd Circuit Court awarded summary judgment to Boyd County in the amount of $32,180.94. This appeal followed.

On appeal, Cooksey again argues that KRS 136.120 is unconstitutional as applied to municipal solid waste disposal facilities that dispose of solid waste by landfill, under Sections 1, 2, 3, 51, and 171 of the Kentucky Constitution and the Fourteenth Amendment to the U.S. Constitution, and that the statute is an impermissible double taxation when combined with KRS 68.178.

We may readily dispose of Cooksey's argument under Section 51 of the Kentucky Constitution, which requires that the subject of an act enacted by the General Assembly be expressed in the title and forbids an act from relating to more than one subject. Cooksey argues that the title to KRS 136.120, "PUBLIC SERVICE CORPORATION PROPERTY TAX; CLASSIFICATION; ASSESSMENT; CERTIFICATION," does not agree with its subject because municipal solid waste disposal facilities are not public service corporations. However, Section 51 requires that the title of an **act** agree with the body of the **act**, not that the title of a **statute** agree with the body of the **statute**. *Arciero v. Hager*, Ky., 397 S.W.2d 50, 53 (1965), *overruled in part on other grounds by Hicks v. Enlow*, Ky., 764 S.W.2d 68 (1989). The act which added municipal solid waste disposal facilities to KRS 136.120 was Senate Bill 2

in the 1991 Extraordinary Session. It is entitled, "AN ACT relating to solid waste management and declaring an emergency." 1991 Kentucky Acts, Ch. 12. This clearly complies with Section 51.

Cooksey's position is better expressed in its remaining constitutional challenges. The Fourteenth Amendment guarantees equal protection of the laws, and Sections 1, 2, and 3 of the Kentucky Constitution mirror that protection. *Revenue Cabinet v. Smith*, Ky., 875 S.W.2d 873, 878 (1994). Section 171 of the Kentucky Constitution provides:

> The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

Cooksey asserts that since municipal solid waste disposal facilities in general and Cooksey in particular are not public service corporations, classification and taxation of these entities under KRS 136.120 is unconstitutional.

The General Assembly has broad discretion in making tax classifications. "[I]n a taxation case, unless a rational basis for such law can be completely refuted, then the law may stand as constitutional. Notably, the burden on the ones attacking the legislative tax arrangement is the negation of every conceivable basis which might support it." *Smith, supra*, at 875. Still, a tax must apply equally to

all in a class, it must not be unreasonable or arbitrary, and it should be based upon some reasonable distinction. *Reynolds Metal Co. v. Martin*, 269 Ky. 378, 107 S.W.2d 251 (1937). Courts will sustain classifications if there are substantial differences between the entities classified. *Id.*

KRS 136.120(1) provides:

> Every railway company, sleeping car company, chair car company, dining car company, gas company, water company, ferry company, bridge company, street railway company, interurban electric railroad company, express company, electric light company, electric power company, telephone company, telegraph company, commercial air carrier, air freight carrier, pipeline company, common carrier water transportation company, privately owned regulated sewer company, cable television company, **municipal solid waste disposal facility, as defined by KRS 224.01-010(15), where solid waste is disposed by landfilling,** railroad car line company, which means any company, other than a railroad company, which owns, uses, furnishes, leases, rents, or operates to, from, through, in, or across this state or any part thereof, any kind of railroad car including, but not limited to, flat, tank, refrigerator, passenger, or similar type car, and every other like company or business performing any public service, except bus line companies, regular and irregular route common carrier trucking companies, and taxicab companies, shall annually pay a tax on its operating property to the state and to the extent the property is liable to taxation shall pay a local tax thereon to the county, incorporated city, and taxing district in which its operating property is located.

(Emphasis added). The inclusion of municipal solid waste disposal facilities was added in 1991 with the enactment of Senate Bill 2.

"Operating property" is the operating tangible property and the franchise,[1] and payment of the tax on operating property is deemed payment of tax on the franchise. KRS 136.115(2). The Revenue Cabinet assesses the property of companies subject to this tax and certifies the values to local taxing authorities. KRS 136.120(3).

Corporations taxed under KRS 136.120 do not pay the corporation license tax required by KRS 136.070. A license tax is a tax levied for the privilege of existing and doing business within the state. 1 Ky. Tax Rep. (CCH) ¶ 5-001 (1997). KRS 136.070 requires corporations to pay taxes measured by the capital employed in business which is apportioned to Kentucky, with a minimum tax of $30.00. "Capital" includes capital stock, surplus, and borrowed money. KRS 136.070(2)(a). This tax is assessed by the Revenue Cabinet. In addition, corporations owning real or personal property in Kentucky are subject to the ad valorem or property tax, KRS 132.020, assessed by local property valuation administrators (PVAs).

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[1] A franchise has been defined as "a right or privilege granted by a sovereign power to a party to do some act which such party could not do without a grant from government." *Eastern Kentucky Resources v. Arnett*, Ky., 934 S.W.2d 270, 275 (1996). However, "[a] corporation's franchise may be one thing or another. The word is not always used with reference to the same meaning. It is sometimes regarded as the mere right to be a corporation." *Cumberland Telephone & Telegraph Co. v. Hopkins*, 121 Ky. 850, 856, 90 S.W. 594, 595 (1906).

Cooksey argues that, until its amendment in 1991, KRS 136.120 applied to corporations all sharing the common quality of operating under franchises or special licensing arrangements. "Municipal solid waste disposal facility" as defined in KRS 224.01-010(15) and incorporated by reference in KRS 136.120 makes no reference to a franchise. On its face, it draws no distinction between corporations operating under a franchise or special privilege and those privately contracting for their customers. Cooksey's president stated in an affidavit that Cooksey privately contracts for its customers and has no franchise or exclusive contract with any government entity. There is no dispute that Cooksey is a municipal solid waste disposal facility disposing of waste by landfill, as those terms are used in the statute. The issue is whether it is constitutional to classify Cooksey and other similar corporations with public service corporations for tax purposes.

Cases interpreting Kentucky Statute (KS) 4077, the predecessor to KRS 136.120, explain that what the law taxed was the added value which the exercise by the corporation of any special or exclusive privilege or franchise not allowed by law to natural persons gives to the tangible property. *Louisville Tobacco Warehouse Co. v. Commonwealth*, 106 Ky. 165, 49 S.W. 1069 (1899). A later case, *Commonwealth v. Louisville Transfer*, 181 Ky. 305, 204 S.W. 29 (1918), held that "the intangible property value intended to be subjected to taxation by section 4077 is in reality that value which is given to tangible corporate property and the exercise of the franchise, arising out of the exclusive or special character of the privilege granted." *Id.* at 307.

The circuit court expressed no particular justification for the classification. It concluded that there was no legal significance to the fact that Cooksey is not a public service corporation, like the other entities taxed under KRS 136.120. It wrote:

> The General Assembly has set forth a rational basis for including businesses that engage in solid waste disposal by the landfill method in KRS 136.120, and Cooksey has not demonstrated as a matter of fact or law that inclusion of that particular business is an unreasonable classification or special legislation that is somehow oppressive or hostile to Cooksey or its particular business. Nor has Cooksey met its burden to negative every conceivable basis which might support the franchise tax imposed upon its intangible assets, . . .

The cases interpreting KS 4077 are of little aid in analyzing KRS 136.120. Until the enactment of the general franchise tax in 1906, public service corporations taxed under KS 4077 were the only corporations taxed on the value of their franchises. "[C]orporations not possessing or exercising an exclusive privilege do not pay a franchise tax at all. The tax upon them is based alone upon the value of their tangible property. . . . " *Marion National Bank of Lebanon v. Burton,* 121 Ky. 876, 90 S.W. 944, 948 (1906). *See also* 1 Ky. Tax Rep., *supra,* ¶ 5-010. Today, each corporation pays a tax on its privilege to do business as a corporation in Kentucky, under either the license tax of KRS 136.070 or the public service tax of KRS 136.120.

KRS 224.43-010 states the policy and purpose for managing solid waste in the Commonwealth. As the statute was amended by Senate Bill 2 in 1991, the General

Assembly stated that "[i]t is the policy of the Commonwealth to limit and reduce the amount of solid waste disposed in municipal solid waste disposal facilities in the Commonwealth and to encourage a regional approach to solid waste management." KRS 224.43-010(2). One of the bill's goals was to reduce by 25 percent by 1997 the amount of municipal solid waste generated by Kentuckians. KRS 224.43-010(4). The general reason given by the General Assembly for solid waste legislation is "to provide for the management of solid waste, including reduction, collection, transportation, and disposal in a manner that will protect the public health and welfare, prevent the spread of disease and creation of nuisances, conserve our natural resources, and enhance the beauty and quality of our environment." KRS 224.43-010(1).

In KRS 224.43-010, the General Assembly has expressed a legitimate state interest in solid waste disposal and has further stated that it desires to limit and reduce the amount of solid waste disposed in municipal solid waste disposal facilities and to encourage a regional approach to solid waste management. KRS 224.43-010(2). In connection with its desire to control these matters, it has elected to cause municipal solid waste disposal facilities to be taxed along with public service corporations pursuant to KRS 136.120. By taxing such facilities in this manner, the Revenue Cabinet has the sole power to value and assess all of the property of each business. KRS 136.120(3). The effect of this is to centralize and bring uniformity to the assessment of these companies'

property.[2] We perceive a rational basis for the inclusion of municipal solid waste disposal facilities with public service corporations for taxation purposes, and Cooksey has not completely refuted that basis.

In *Reynolds Metal, supra,* the Depression-era court upheld a tax exemption for the banking industry because of the profound effect on the state economy and the need to keep interest rates low. *Id.*, at 262. In *Delta Air Lines, Inc. v. Commonwealth,* Ky., 689 S.W.2d 14 (1985), the court justified preferential treatment for truck lines and railroad lines due to their significance to the state economy. *Id.* at 18. In the case sub judice, the classification of municipal solid waste disposal facilities that dispose of waste by landfill with public service corporations singles out these corporations for tax assessment unlike any other type of waste disposal facility. Although this classification is not a perfect fit, it is reasonably related to the General Assembly's goals for solid waste management. The statute is constitutional since Cooksey has not refuted every conceivable basis to support the classification. *Smith, supra,* at 875.

Cooksey also contends that KRS 136.120, in combination with KRS 68.178, constitutes double taxation. Double taxation results where two or more taxes are "(1) imposed

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[2] Property owned by companies that are not taxed as public service corporations under KRS 136.120 is assessed by local PVAs. Such assessments are made by separate offices in each of the counties across the Commonwealth and may not be as consistent, from county to county, as central assessment by the Revenue Cabinet.

on the same property, (2) by the same state or government, (3) during the same taxing period, and (4) for the same purpose." *Fox v. Board for Louisville & Jefferson County Children's Home*, 244 Ky. 1, 13, 50 S.W.2d 67, 72 (1932). The circuit court's order made no mention of this argument. At any rate, we disagree with Cooksey's contention.

To meet the first requirement, Cooksey must show that the license fee authorized by KRS 68.178 taxes the same property as KRS 136.120. The license fee is based upon a percentage of gross receipts. Cooksey suggests that this is actually an occupational tax, citing *Commissioners of Sinking Fund v. Hopson*, Ky. App., 613 S.W.2d 621, 623 (1980) (license fee in city ordinance that did not regulate but was only revenue measure is an occupational tax). Cooksey then notes that "operating property" is defined as the operating tangible property and the franchise. KRS 136.115(2). Describing the franchise as the right to do the business for which the corporation was created, Cooksey concludes both taxes tax the right to operate a municipal solid waste disposal facility. We disagree.

In *Falls City Brewing Company v. Talbott*, 265 Ky. 541, 97 S.W.2d 57 (1936), Falls City challenged the imposition of a production tax, in addition to the corporate license tax and occupational tax it was already paying. The court observed that the problem of double taxation is generally confined to property taxes. It also quoted with approval from a 1924 treatise: "It is a settled rule that it is not double taxation to impose an ad valorem tax on property used in a business and also to impose a license tax on the business or the use of the property." *Id.*, at 59. The court

concluded that corporate license taxes, occupational taxes, and production taxes tax different taxable items and do not constitute double taxation. *Id.* at 60.

The taxes authorized by KRS 68.178 and KRS 136.120 tax different taxable elements. The latter statute taxes a corporation's tangible property, the former its gross receipts. The Revenue Cabinet assesses the operating property, defined by KRS 136.115(2) as the operating tangible property and the franchise, of a domestic public service corporation by its fair cash value as a unit. KRS 136.160(1). Although 136.115(2) deems payment of taxes on operating property to be payment of taxes on the franchise, Cooksey has not shown that Boyd County did, in fact, tax the value of a franchise under KRS 136.120. On the tax bill Boyd County sought to collect, Cooksey's property was assessed at two rates, real estate and tangible. Franchise is not mentioned.

Cooksey has not shown what, if any, license fee Boyd County actually adopted pursuant to KRS 68.178, or that it has imposed such a fee on Cooksey. Even if it has, and even if the fee authorized by KRS 68.178 can be characterized as a tax on Cooksey's right to do business, the public service corporation property tax under KRS 136.120 and the levy under KRS 68.178 are not double taxation.

Cumberland Telephone & Telegraph Co. v. Hopkins, 121 Ky. 850, 90 S.W. 594 (1906), cited by Cooksey, is distinguishable. In that case, a telephone company and a railroad company successfully challenged a local license tax. The Court reasoned that since the railroad was required by charter to carry freight and passengers to Hopkins,

and Hopkins had sold the telephone company the privilege of operating its line and conducting business in the city, the city could not also tax the companies for those same privileges. *Id.* at 597. In the case sub judice, Cooksey has no charter or special privilege from Boyd County on which to be taxed.

KRS 136.120 is constitutional as applied to Cooksey and other municipal solid waste disposal facilities, and there is no impermissible double taxation. There were no material facts in issue, and Boyd County was entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 483 (1991).

We affirm the judgment of the Boyd Circuit Court.[3]

ALL CONCUR.

BRIEFS FOR APPELLANT:

Ernest M. Pitt, Jr.
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Douglas P. Romaine
Lizbeth Ann Tully
Lexington, KY

BRIEF FOR APPELLEE:

Daniel King, III
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[3] To the extent that we are affirming the trial court for different reasons than it gave in its judgment, we have the authority to do so. *See Revenue Cabinet v. Joy Technologies, Inc.*, Ky. App., 838 S.W.2d 406, 410 (1992).

COMMONWEALTH OF KENTUCKY
BOYD CIRCUIT COURT
DIVISION II
96-CI-00227

BOYD COUNTY, KENTUCKY, PLAINTIFF,

-VS- FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

(Filed Jan. 23, 1997)

COOKSEY BROTHERS DISPOSAL COMPANY, INC., DEFENDANT.

The plaintiff having moved for summary judgment and the court having considered the memorandums of law filed by both parties and being otherwise fully and sufficiently advised, hereby makes the following Findings of Fact, Conclusions of Law and Judgment, to wit:

FINDINGS OF FACT

1. The court finds that it has personal jurisdiction over all the parties to this action and has subject matter jurisdiction of the issues set forth in the Complaint.

2. The court finds that the defendant, Cooksey Brothers Disposal Company, Inc. (hereinafter "Cooksey") owns certain assets situated in Boyd County, Kentucky, and operates therein a municipal solid waste disposal facility as defined by KRS 224.005(15), where solid waste is disposed by the landfilling method.

3. The court finds that certain assets owned by Cooksey situated in Boyd County, Kentucky, are subject to the franchise tax set forth in KRS 136.120(1), as amended in 1991, which is in fact an *ad valorem* property

tax on the intangible assets of its business, *Greene v. Louisville & I.R. Co.*, 37 S.Ct. 673, 244 U.S. 499, 61 Led 1280 (1917).

4. The court finds no legal significance to Cooksey's argument that it is not a public service corporation or a public utility. The plaintiff has conceded that Cooksey is not a public service corporation nor a public utility, but those are not the only business entities subject to the provisions of KRS 136.120. The word "franchise" as used in KRS 136.120 means a tax on the franchise of every corporation, company or association performing any public service, and is not employed in any technical sense, but when construed with other nearby sections, it is plain that the legislature intended that the entire property, both tangible and intangible, of all foreign and domestic corporations and all foreign and domestic companies possessing no franchise should first be valued as an entirety, then the value of the tangible property be deducted, and the value of the intangible property thus ascertained to be taxed under these provisions, *Adams Express Company v. Kentucky*, 166 U.S. 171, 41 L.Ed. 960 (1897).

5. The court finds no hostile or oppressive discrimination against Cooksey by inclusion of its business in KRS 136.120.

CONCLUSIONS OF LAW

6. The franchise tax as set forth in KRS 136.120(1) is not arbitrary, unreasonable, hostile or oppressive as to Cooksey or the business in which it is engaged. Cooksey, and all other solid waste landfill businesses, are obligated to pay the same rate of tax on their respective intangible

assets as all other businesses set forth in that statute. The presumption of constitutionality of KRS 136.120 can only be overcome by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular person and classes, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, *Madden v. Kentucky,* 309 U.S. 83, 88, 84 L.Ed. 590 (1940). Cooksey has failed as a matter of law to meet its burden with regard to the constitutionality of KRS 136.120.

7. It is well within the constitutional authority of the Kentucky General Assembly to classify what types of businesses and what assets of those businesses are subject to the franchise tax provided in KRS 136.120, so long as a rational basis exists for any such classification, *Com., Revenue Cabinet v. Smith,* 875 SW2d 873 (Ky. 1994), *cert. den. sub nom Yeoman v. Commonwealth,* ___ U.S. ___, 115 S.Ct. 509 (1994).

8. The General Assembly has set forth a rational basis for including businesses that engage in solid waste disposal by the landfill method in KRS 136.120, and Cooksey has not demonstrated as a matter of fact or law that inclusion of that particular business is an unreasonable classification or special legislation that is somehow oppressive or hostile to Cooksey or its particular business. Nor has Cooksey met its burden to negative every conceivable basis which might support the franchise tax imposed upon its intangible assets, *Madden, supra.*

9. The plaintiff is entitled to judgment against the defendant for the franchise tax for the years set forth in the original Complaint, and the additional years which

were supplemented by leave of court pursuant to CR 15, as well as all interest and penalties thereon otherwise permitted by statute.

JUDGMENT

10. The plaintiff, Boyd County Kentucky, is hereby awarded Judgment against the defendant, Cooksey Brothers Disposal Company, Inc., in the amount of $32,180.94, plus all accrued interest and applicable penalties thereon as permitted by law.

11. There being no just cause for delay, this is a final, appealable Judgment pursuant to CR 54 and all other applicable law.

/s/ C.W. Hagerman
Judge, Boyd Circuit Court

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Judgment have been mailed, postage pre-paid, to:

Hon. Daniel King, III
Assistant Boyd County Attorney
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ROBERT L. TEMPLETON, P.S.C.
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P.O. Box 1919
Ashland, Kentucky 41105-1919

This the 23 day of January, 1997

NANCY KAY ARTHUR, BOYD CIRCUIT CLERK

BY: /s/ Rita Bloebaum D.C.

Supreme Court of Kentucky

97-SC-1110-D
(97-CA-400-MR)

COOKSEY BROTHERS DISPOSAL COMPANY, INC.
MOVANT

V. BOYD CIRCUIT COURT
96-CI-227

BOYD COUNTY, KENTUCKY
RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED May 13, 1998.

/s/ Robert F. Stephens
Chief Justice